

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

<b>THOMAS J. BURNS,</b>	)	
	)	
Plaintiff,	)	
	)	C.A. No. 02C-11-059
v.	)	
	)	
<b>LAVENDER HILL HERB FARM, INC.,</b>	)	
<b>MARJORIE S. LAMB,</b>	)	
<b>HELEN CALDER LAMB,</b>	)	
<b>KATHRYN ELIZABETH LAMB,</b>	)	
<b>SUZANNE I. SEUBERT,</b>	)	
<b>CHRISTINE K. DEMSEY, and</b>	)	
<b>DEMSEY &amp; SEUBERT, P.A.,</b>	)	
	)	
Defendants.	)	

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<b>THOMAS J. BURNS,</b>	)	
	)	
Plaintiff,	)	C.A. No. 03C-03-192
	)	
v.	)	
	)	
<b>LAWRENCE F. HARTNETT,</b>	)	
<b>JENNIFER A. HARTNETT, and</b>	)	
<b>HARTNETT &amp; HARTNETT,</b>	)	
	)	
Defendants.	)	

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Submitted: February 6, 2006  
Decided: May 30, 2006

UPON CONSIDERATION OF THE SEUBERT AND HARTNETT  
DEFENDANTS' MOTION TO DISMISS  
**GRANTED.**  
**ORDER**

Thomas J. Burns, Hockessin, Delaware, *Pro se*, Plaintiff.

Kevin J. Connors, Esquire, Marshall Dennehey Warner Coleman & Goggin,  
Wilmington, Delaware, Attorney for Seubert Defendants.

Joseph Scott Shannon, Esquire, Marshall Dennehey Warner Coleman &  
Goggin, Wilmington, Delaware, Attorney for Hartnett Defendants.

SCOTT, J.

## **INTRODUCTION**

Before the Court is a Motion to Dismiss filed by Suzanne I. Seubert, Christine K. Demsey, and Demsey & Seubert, P.A. (collectively “the Seubert Defendants”), seeking dismissal of an abuse of process claim filed by Thomas J. Burns (“Burns”) and a Motion to Dismiss filed by Lawrence F. Hartnett, Jennifer A. Hartnett, and Hartnett & Hartnett (collectively “the Hartnett Defendants”), seeking dismissal of a legal malpractice action. As will be set forth more fully hereafter, Burns’ failure to appear at the February 6, 2006 hearing as well as his attempt to repackage the same claims that he has already pursued in different courts warrants dismissal of the present claims. Accordingly, the Seubert and Hartnett Defendants’ Motions to Dismiss are **GRANTED**.

## **FACTS**

On November 8, 2002, Burns, a former employee of Lavender Hill Herb Farm, Inc., brought this action against Lavender Hill Herb Farm, Inc., Marjorie S. Lamb (“Marjorie”), Helen Calder Lamb, Kathryn Elizabeth Lamb, Suzanne I. Seubert (“Seubert”), Christine K. Demsey (“Demsey”), and Demsey & Seubert, P.A. (“Demsey & Seubert”). Defendant Seubert represented Marjorie in proceedings related to her divorce from Burns.

Demsey was Seubert's law partner and never personally represented Marjorie. The Complaint alleges two counts of abuse of process against the Seubert Defendants. After being removed to the United States District Court for the District of Delaware, the case was transferred to the United States District Court for the Eastern District of Pennsylvania. On May 12, 2003, the case was reassigned from the calendar of the Honorable Herbert J. Hutton to the calendar of the Honorable Cynthia M. Rufe as it was related, if not identical, to another case that was currently pending before the court. On July 21, 2003, the court dismissed the Seubert Defendants for lack of personal jurisdiction. On September 25, 2003, the court dismissed the action without prejudice as to all remaining defendants for lack of subject matter jurisdiction. Burns filed a Notice of Appeal on October 8, 2003. The United States Court of Appeals for the Third Circuit affirmed the September 25, 2003 Order. On September 9, 2005, Burns filed a Notice of Re-Filing of Complaint with the Superior Court.

In Count IV of the Complaint, Burns contends that on January 17, 2000, Seubert was given detailed business records concerning Burns' business and Marjorie's involvement in a consumer fraud scam. Shortly after receiving these records, Burns alleges that Seubert or someone acting on her behalf destroyed the records. Believing that all evidence of the fraud

had been destroyed, Seubert allegedly sent a letter dated March 10, 2000, to Burns' attorney containing false information. This letter was subsequently incorporated by reference into a motion filed in the Family Court of the State of Delaware. Burns further contends that Seubert instructed Marjorie to sign affidavits at a time when both individuals knew that the allegations contained within were false.

In Count V of the Complaint, Burns alleges that the Defendants entered his residence and removed the business records with the intent to destroy his business and to conceal their fraudulent venture. Burns contends that Seubert attempted to cover up her involvement and the Defendants' fraud. Specifically, Burns asserts that Seubert entered the Lavender Hill Herb Farm W-2 tax returns into evidence during a Family Court hearing. However, on two subsequent occasions she filed affidavits with the Family Court denying knowledge of said tax forms. Burns asserts that these acts caused him the loss of his business and emotional distress.

On March 20, 2003, Burns filed a legal malpractice action against the Hartnett Defendants arising out of their representation during the divorce proceedings. On September 30, 2005, the Seubert Defendants filed a Motion to Dismiss Burns' Complaint. Approximately a month later Burns filed his response. In the months that followed, the litigation proceeded in

its normal course. The docket sheet indicates that both sides actively filed motions and arguments were heard before the Court on several occasions. In a letter dated December 6, 2005, the Court confirmed that oral argument on the Seubert Defendants' Motion to Dismiss would be heard on February 6, 2006. On December 23, 2005, the Hartnett Defendants filed a Motion to Dismiss. On January 17, 2006, the court granted the Seubert Defendants' Motion for Re-Argument. In that Order, the Court noted that the Seubert Defendants were not obligated to answer Burns' request for admissions, pending a decision by the Court on the Seubert Defendants' Motion to Dismiss scheduled for argument on February 6, 2006. The Court also indicated that the Hartnett Defendants' Motion to Dismiss was scheduled for February 6, 2006.

Ten days before the Seubert and Hartnett Defendants' hearing on their Motion to Dismiss, a New Castle County jury found Burns guilty as to two counts of Forgery First Degree, Forgery Third Degree, and Offering a False Instrument for Filing. After Burns' conviction on January 27, 2006, the docket sheets in these actions reflect no activity by Burns. Burns failed to appear before this Court on February 6, 2006, at which time the Court heard the Seubert and Hartnett Defendants' Motions to Dismiss. After hearing the allegations and proofs set forth by the Seubert Defendants, judgment was

hereby granted against Burns. The Court orally advised the Seubert Defendants that their Motion was granted and that a subsequent written opinion would be issued embodying the Court's decision. Likewise, the Court dismissed the Hartnett case for failure to prosecute. On February 7, 2006, the prothonotary sent out a Rule 41(e) form notifying the remaining parties in the Lavender Hill action that there had been no activity during the past six months and that if no proceedings were taken within the next thirty days, the action would be dismissed by the Court for want of prosecution. Burns did not file a timely response. Thus, the case was dismissed against the remaining defendants for want of prosecution.

### **DISCUSSION**

It is settled law that the trial court has discretion to dismiss an action for failure to prosecute.<sup>1</sup> This authority stems from the court's inherent power to "manage its own affairs and to achieve the orderly and expeditious disposition of its business."<sup>2</sup> But the important goal of timely adjudications must be balanced against the strong policy in favor of decisions on the merits.<sup>3</sup> The problems arising from a *pro se* litigant's lack of familiarity with the law and court procedures also must be considered. The procedural

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<sup>1</sup> *Ayers v. D.F. Quillen & Sons, Inc.*, 188 A.2d 510 (Del. 1963); Super. Ct. Civ. R. 41.

<sup>2</sup> *Gebhart v. Ernest DiSabatino & Sons, Inc.*, 264 A.2d 157, 159 (Del. 1970).

<sup>3</sup> *Battaglia v. Wilmington Savings Fund Society*, 379 A.2d 1132, 1135 (Del. 1977).

posture of these cases and the other cases filed by Burns indicate that he was familiar with court procedures and the law as of February 6, 2006. He was given ample notice of the hearing and even indicated in subsequent filings to the Court that he was aware of the date. The only possible explanation that the Court can find for Burns' failure to appear is his conviction for forgery in the Superior Court just ten days before this hearing. Having failed to appear, and after hearing the allegations and proof as set forth by the Seubert and Hartnett Defendants, the Court granted the Motions to Dismiss. As the Honorable Judge Jordan stated in *Acierno v. Haggerty*,<sup>4</sup> a litigant cannot seek "a second bite at the apple." From the facts alleged in the briefs and at the hearing, it appears as if Burns is attempting to do exactly that. He was given an opportunity to appear for a hearing to rebut the Seubert and Hartnett Defendants' claims that the case was merely repetitive of other cases filed and decided by different courts yet he failed to appear. The Court finds that Burns' failure to appear at a hearing which he was well aware of and his attempt to repackage the same claims that he has already pursued in other courts is fatal to the present claims, and thereby, warrants dismissal. A court is not required to hear repetitive and frivolous litigation of claims that

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<sup>4</sup> 2005 WL 3134060 (D. Del.).



have already been decided. Accordingly, the Seubert and Hartnett Defendants' Motions to Dismiss are **GRANTED**.

**IT IS SO ORDERED.**

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Judge Calvin L. Scott, Jr.